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THE STATUS OF TRADE UNIONS IN ENGLAND.

THE late Professor Maitland in his introduction to the translation of Gierke's Political Theories of the Middle Ages and in a number of lectures and papers [1] now conveniently accessible has familiarized English lawyers with the conception of the reality of corporate personality, and has shown how the institutions of English law (notably the trust) have made possible something like a corporate life in associations to which the formal recognition of corporations has not been accorded. I do not propose in what follows to discuss the validity of the realist conception, in support of which, following in Maitland's footsteps and by way of comment and illustration, I have said something elsewhere.[2] Nor is my title, "The Status of Trade Unions," intended to beg any question of ultimate jurisprudence, much less of metaphysics or psychology, but merely to denote an aggregate of phenomena, which, in their practical working, bear a remarkable resemblance to the status of legally recognized corporations.

The layman might expect that bodies so numerous, so permanent, and often so powerful as trade unions would have received the same formal recognition of their corporate character as has been conferred in one way or another on universities and colleges, on railway companies, and on the numerous trading bodies which we know

[1] Maitland, Collected Papers, iii, 210–270.

[2] Legal Personality, an inaugural lecture, 27 L. Quart. Rev. 90.

as limited companies. As a matter of fact for good or for ill this has not been done, and trade unions in substance remain in the class of what are called "voluntary" societies, — voluntary not because it is a matter of free choice whether a man will belong to such a society or not, for this may be equally true of membership of a corporation, but because its legal existence, so far as it has a legal existence, is the creation of the will, real or presumed, of its members and does not require the coöperation of any public authority.

It has come into existence simply because its members have agreed to associate; as soon as that agreement is lawfully ended, the association ceases to exist. Nothing beyond this agreement is necessary for its constitution; nothing beyond the lawful ending of the agreement is needed to put an end to the association. The acts of such an association are in the eye of the law the acts of its members, or at least of some of its members; its rights and liabilities are ultimately analysable in accepted legal theory into the rights and liabilities of individual persons.[3] Thus there is no special law of associations in England. The law governing associations is in substance the general law of contract, of agency, and of property applied to aggregates of numerous individuals. There is not and never has been any general law forbidding, nor has any special law been needed to allow, persons to associate. Freedom of association has never been looked upon as a privilege requiring constitutional guarantees.

Generally speaking, whatever one man may lawfully do, two or more may lawfully do in concert or combination; and though it may be true[4] that in certain cases combined conduct is illegal where the like acts done without combination would be lawful, any such rule against combination if it exists is not a rule relating

[3] No analysis is capable of expressing the whole truth, and in the present case the analysis cannot be made even approximately adequate to the facts without the help of fictions, notably the fiction of countless contracts which have no existence in the minds of the members. The only escape from such fictions would be found in the frank recognition of the corporate personality of voluntary associations. But for my present purpose, I am content *stare super antiquas vias*.

[4] As to the various views which have been held in England on the question of liability, civil or criminal, for conspiracy, see Erle, Trade Unions (1869); Wright, Criminal Conspiracies (1872); and the statements of Mr. Arthur Cohen and Sir Godfrey Lushington in the Report (1906) of the Royal Commission on Trade Disputes and Trade Combinations.

to associations as such, but applies just as much to the temporary combination of two persons, as to a permanent association of two hundred or twenty thousand. The law knows of no distinction of principle between the temporary agreement of a few and the permanent association of many.

Let us see now how the general law operates in its application to voluntary associations.

1. The law of contract.

An association may be regarded in the first instance as a contract between its members. Any two or more persons may enter into a contract for any lawful object. The promises contained in such a contract made by each member bind him to the performance of such promises, and each is entitled to claim such performance from the others. The terms of such a contract will be found in the rules of an association by which a member on entering agrees expressly or impliedly to be bound, and to the observance of which on the part of other members and of the officers of the society he is entitled.

A contract in general cannot be altered without the consent of everyone who is a party to it. If by the rules the subscription is fixed at a certain amount, a member cannot be forced, on pain of deprivation of membership, to pay an increased subscription.[5] But since unanimity in a large body is difficult or impossible, the rules themselves will generally be so framed as to give to a majority, or to a specified majority, *e. g.*, two thirds, usually after compliance with some requirement of notice, a power of alteration. Such a power of alteration will then be a part of the original contract between the members, and every member will be bound by an alteration duly made in accordance with it.[6]

Regarded as a contract, then, the rules of a society are a set of promises made by each member to all the other members, or, where they relate specially to the functions of the society's officers, promises made by the officers to the members generally and by the members generally to the officers. Such a contract regulates the rights and duties of members to each other. Such contracts do not in themselves impose any liability on members towards strangers, or on strangers towards the members.

[5] Harington *v.* Sendall, [1903] 1 Ch. 921.

[6] Thellusson *v.* Viscount Valentia, [1907] 2 Ch. 1.

2. The principles of agency.

It is in the nature of things impossible that all the members of an association should directly take part in every act necessary for carrying out the purposes of the association, and they will therefore provide for the appointment of officers, usually themselves members of the society, for doing most of the acts necessary for these purposes. Such officers are in law agents, persons whose acts will operate to confer rights on the members of the society as against strangers, and rights upon strangers as against the members of the society. Their acts are in law the acts of the members. Nor is this attribution of the agent's acts to those for whom he acts a mere fiction of the law. Where liabilities are incurred by contract, *e. g.*, by the purchase of goods or the hire of services, in accordance with the authority conferred, there is no difficulty in seeing the substantial justice of holding those who have given the authority to be subject to the liability, nor is there any substantial injustice in holding that a similar liability arises where the agent is ostensibly clothed with an authority which is wider than that which has really been conferred. Where again the agent in the course or scope of his employment commits wrongful acts whether wilful or negligent against strangers, those who employ him will incur liability to make good the damage suffered: and the great breadth with which this rule has been generally employed in English law is not felt in ordinary cases to work any substantial injustice. In the case of associations the actual or ostensible authority of the agent or the scope or course of his employment will largely, at any rate, depend on the purposes of the association as declared in its rules.

3. The law of property, especially the law of trusts.

What is the legal position of the property of such a society? The law allows property to be owned not only by individuals separately, but also by two or more individuals as co-owners. Thus it is conceivable that the property of an association might directly be held by all the members as co-owners. But in practice such an arrangement would be found unworkable, for the legal forms of transfer are such that the necessary transfer of interests on the retirement of members and the entry of new members could not in practice be carried out. Thus it becomes necessary that the common property should be ostensibly in the hands of some

few individuals on behalf of the society and the members generally. The English law of trusts affords peculiar facilities for such an arrangement. Land and buildings, stocks and shares and money, may be vested in a small number of trustees, who as legal owners can deal with such property, take proceedings for its recovery and protection, and dispose of it to strangers, while the rights of the members in such property are a form of legally recognized, "equitable," beneficial ownership. Such equitable ownership of the members, however, is not a pure co-ownership. It is a co-ownership for the purposes and subject to the rules of the society, and the member's right is not a direct right to a share, but a right to participate in the benefits and control of the property as "social property." [7] The member of a club, for instance, is not entitled as an ordinary co-owner would be to have the club property partitioned ; he is only entitled to use it as club property.[8]

This possibility of subjecting property to a common purpose is restricted by the rule against perpetuities. Thus a bequest of property to a society in terms which provided that it should permanently, or for a period longer than the rule allows, be preserved intact as capital, would, unless the purposes of the society were charitable, be invalid. But there seems to be nothing objectionable in the holding of property by a society as an endowment in fact, so long as the society by its rules retains power at any time to deal with the capital at its pleasure.[9]

4. The application of the foregoing principles to the liability of societies, and their members, and of the social property.

On general principles the liability which persons incur for the acts of their agents is a direct liability of every such person, and is unlimited in amount, a rule well illustrated by the common law as to partnership. But in the case of associations for purposes other than those of individual profit, the principle is established, at any rate as regards contractual liabilities, that the authority conferred by the members on the agents of the society is not an

[7] It seems convenient to use the phrase "social property" as meaning what is technically property held upon trust for the members of the society for the purposes and subject to the rules of the society, and is in effect the property of the society.

[8] *In re* St. James's Club, 2 De G. M. & G. *383 (1852).

[9] See Carne *v.* Long, 2 De G. F. & J. *75 (1860); Cocks *v.* Manners, L. R. 12 Eq. 574 (1871); *In re* Clarke, [1901] 2 Ch. 110; *In re* Swain, 24 T. L. R. 882 (1908).

authority to pledge the credit of each member generally, but only to the extent of the common property, and that persons dealing with the officers of such associations must be taken to know that they can look only to such common property for payment.[10] In the case of liability for wrong, it seems that no attempt has ever been made to establish any wider liability of the members.[11] On the other hand, it is clear that within the ordinary limits of the liability of a principal for the acts of his agent, the social property will be liable whether for contract or wrong, through the medium of proceedings brought by the stranger against the members generally in what is called a "representative" action, a few prominent members being selected to represent all; or against the trustees in whom the common property is vested; or by proceedings brought by an officer who has been compelled to pay damages to a stranger, for an indemnity against the members and trustees. In this way the social property is treated in effect as being what it is in truth, — the property of a body distinct from its members. Further, it would seem that in practice and probably in principle the social property is not subject to the private liabilities of the members; *e. g.*, my share in the property of my club cannot be made available for payment of my private groceries bill.

I now proceed to deal specifically with the position of trade unions.

First, a trade union is in substance a voluntary society. The legislature in 1871 was unwilling to incorporate trade unions, and then as now trade unionists were almost unanimously opposed to

[10] *In re* St. James's Club, *supra*; Flemyng *v.* Hector, 2 M. & W. 172 (1836); Wise *v.* Perpetual Trustee Co., [1903] A. C. 139.

[11] The committee of a political association acting within the general scope of their authority publish a pamphlet which contains a libel on A. Can it be supposed that A. could hold individual members liable without limit for payment of the damages which he may recover? If it is argued that the rules of the association which expressly or impliedly limit the liability of members to payment of their subscriptions are *res inter alios acta* which cannot limit A.'s rights, the answer is that the relation between the members and their executive is not like that of master and servant in which the master at every moment retains the power of controlling the servant's actions. There seems to be nothing to prevent the courts from holding that the agency in such a case is *sui generis*, analogous to the position of an independent contractor in involving no personal liability of the members, but differing from it in that the members have authorized the social property to be employed for certain purposes and have thereby rendered it liable for wrongs done in the course of effecting those purposes.

incorporation. This unwillingness was due largely to fear, on the one hand that incorporation would confer on them far larger powers than they would possess as voluntary societies, on the other that it would subject them to liabilities from which as voluntary societies they would be free. Both fears were largely based on a failure to appreciate the fact that the principles of contract, agency, and trust in reality place a voluntary society in a position which for practical purposes, both as regards powers and liabilities, is very little different from that of a corporation. It was this mistaken belief which caused trade unionists to regard the decision in the Taff Vale case [12] as an injustice, on the ground that it placed trade unions under liabilities from which the legislature by refusing incorporation had left them free. In substance that decision was nothing more than an application to trade unions of general principles which are applicable to all voluntary societies, and which might well be applied to such bodies as the Tariff Reform League or the Gladstone League.[13]

Secondly, trade unions before 1871 were commonly believed to be, and in many or most cases really were, illegal societies, on the ground that their purposes were in restraint of trade. The Trade Union Act of 1871 assumed that a trade union must be an illegal society in this sense by including in the statutory definition only combinations which at common law would be illegal on the ground of restraint of trade. As a matter of fact this belief in the necessary illegality of trade unions was also erroneous. The amending Act of 1876 removed common-law illegality from the statutory definition, and a fair number of recent cases, notably the second action brought by Mr. Osborne against the Amalgamated Society of Railway Servants,[14] have shown that a very efficient trade union, fulfilling all the purposes for which trade unions exist, may be formed without incurring the taint of common-law illegality. The precise effect of the illegality of trade unions at common law, where it existed, was never determined. The following seems to be as complete a statement as is possible.

[12] Taff Vale Ry. Co. *v.* Amalgamated Society of Railway Servants, [1901] A. C. 426.

[13] The Times of March 6, 1912, publishes an opinion given by Sir Edward Clarke, K. C., to the effect that it would be possible by means of a representative action to render the funds of the Women's Social and Political Union liable for damage to property committed on behalf of that society.

[14] Osborne *v.* Amalgamated Society of Railway Servants (No. 2), [1911] 1 Ch. 540.

At any rate since the repeal in 1824 of the older statutes against combinations, no person has ever been punished for mere membership of a trade union. The prosecution and punishment of trade unionists have always been for particular acts done in combination, in most cases amounting to offenses against statutes then in force, in a few doubtful cases offenses against the common law of conspiracy. In spite of some older *dicta* to the contrary, it seems now certain that mere membership of a trade union was never at common law a punishable offense.[15]

It seems clear that not only contracts directly in restraint of trade, *e. g.*, agreements not to work, but all contracts sufficiently closely connected with the illegal purposes of a trade union, *e. g.*, agreements to pay subscriptions to a union whose purposes were illegal, or agreements to provide benefits for members of such a union, would be void; and this would go far to make all the rules of such a trade union void and legally inoperative.

There seem to be no cases before 1871 of actions brought by or against trade unions in respect of the acts of the officers of the union, and it is a matter of mere speculation whether the illegality of the purposes of the union would have been a bar to such actions on either side.

The disabilities in respect of property involved in the illegal character of trade unions are also somewhat uncertain. It is substantially true that till shortly before 1871 a member of a trade union who misappropriated trade-union property could not be made criminally liable. But this was not primarily due to the illegality of a trade union, but to the common-law rule that the misappropriation of common property by a co-owner was not theft. This rule imposed a disability which trade unions shared with such respectable associations as business partnerships or the Young Men's Christian Association. Before this disability was removed a special procedure to prosecute for misappropriation was conferred by statute on friendly societies, and two decisions[16] laid it down that the illegality of the purposes of a trade union prevented it from using this procedure. But as soon as the Larceny

[15] *Dicta* of Crompton, J., in Hilton *v.* Eckersley, 6 E. & B. 47 (1855), dissented from in Mogul S. S. Co. *v.* McGregor, [1892] A. C. 25, 47, 58.

[16] Hornby *v.* Close, L. R. 2 Q. B. 153 (1867); Farrer *v.* Close, L. R. 4 Q. B. 602 (1869).

Act of 1868 had removed the common-law rule as to co-owners, it was held (even before the passing of the Act of 1871) that a trade union could prosecute for misappropriation by one of its members.[17]

As to the civil position of trade-union property, it would seem that the illegality of the purposes of a trade union would make void any trust of property for those purposes. But it does not follow that such property was wholly at the mercy of the person who for the time being held it. On the contrary, it is submitted that such a person would hold it upon a resulting trust. He would hold it for the benefit of those whose contributions it represented, *i. e.*, the members individually, so that each individual member would be entitled to call for a return of his contribution, so far as it has not been employed for trade-union purposes.[18] This would have put it in the power of dissentients to embarrass a union by taking proceedings for the division of the property, but would not have left the property destitute of all legal protection.

The Trade Union Act of 1871 dealt with the status of trade unions in the following way:

It made clear that the illegality of the purposes of a trade union should not be such as to involve any liability to punishment of members.[19] Agreements and trusts for trade-union purposes were declared not to be void, and thus the agreements embodied in the rules of a trade union, and the trusts upon which property was held for trade-union purposes, became valid agreements and trusts, and except so far as the contrary was provided in the next section, with regard to agreements, all such agreements and trusts would be entitled to legal protection and direct enforcement in the courts.[20] It was declared that a number of specified agreements should not by reason of the passing of the Act become directly enforceable.[21]

[17] Regina *v.* Blackburn, 11 Cox C. C. 157 (1868).

[18] *Cf.* Regina *v.* Tankard, 17 Cox C. C. 719, [1894] 1 Q. B. 548; *In re* Printers' etc. Society, [1899] 2 Ch. 184.

[19] 34 & 35 Vict. c. 31, § 2: "The purposes of any trade union shall not, by reason merely that they are in restraint of trade be deemed to be unlawful, so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise."

[20] *Id.*, § 3: "The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust."

[21] *Id.*, § 4: "Nothing in this Act shall enable any court to entertain any legal proceed-

The object of this provision was on the one hand to prevent a union from using legal proceedings for the purpose of controlling its members or outsiders, and on the other to prevent a union from being embarrassed by suits brought by members for payment of benefits or the like. But not only was it declared that nothing in the section should render any such agreement unlawful, but it is clear, both from the wording of the section and from subsequent cases, that it does not prevent proceedings from being taken for the enforcement of any such agreement, if proceedings could have been taken before the Act. Thus, for instance, in the case of a union whose purposes are not illegal at common law on the ground of restraint of trade, there is nothing to prevent a member of the union from suing for payment of benefits to which he is entitled under the society's rules. The whole of these provisions apply to all trade unions whether registered or unregistered, and there is nothing to require any trade union to be registered.

The subsequent provisions of the Act of 1871 (except the defining and repealing sections 23 and 24) relate to registered unions.[22] Any seven or more members may, by subscribing their names to the rules of the union and otherwise complying with the provisions of the Act, register the union with the Registrar of Friendly Societies. The registration is, however, void if any of

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ing instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely: —

"(1) Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ or be employed;

"(2) Any agreement for the payment by any person of any subscription or penalty to a trade union;

"(3) Any agreement for the application of the funds of a trade union,

"(*a*) To provide benefits to members; or

"(*b*) To furnish contributions to any employer or workman not a member of such trade union, in consideration of such employer or workman acting in conformity with the rules or resolutions of such trade union; or

"(*c*) to discharge any fine imposed upon any person by sentence of a court of justice; or

"(4) Any agreement made between one trade union and another; or

"(5) Any bond to secure the performance of any of the above-mentioned agreements.

"But nothing in this section shall be deemed to constitute any of the above-mentioned agreements unlawful."

[22] *Id.*, §§ 6–22.

the purposes of the union are unlawful;[23] *i. e.*, unlawful in some sense other than that of merely being illegal at common law on the ground of restraint of trade. The main object of providing for registration was to give some security for the proper conduct of the union by requiring annual returns to be made to the Registrar showing the financial position of the union, the changes made in the rules and the changes of officers, and in this way to protect the interests of the members. It confers some, but no very large, privileges on the union; nor does it, except in so far as there may be a difference in the application to registered and unregistered unions of the principle of *ultra vires*, impose restrictions on it.

"The Act of 1871, s. 6," says Lord Johnston in a Scotch case,[24] "provides for the registration of Trade Unions, but the registration is voluntary. I do not find that this registration confers any privileges on the Union. What it does is rather to place it under certain regulations intended mainly for the protection of its own members. If it imposes any restrictions they are incidental merely. It certainly does not incorporate the Union or give it the status of a registered Company, or even of a Friendly Society. As I read it, its object and effect was to secure to the workman that if he does join a registered Trade Union, he may rely on its affairs and in particular its finance being conducted with some claims to regularity and soundness."

This *dictum*, though substantially true, is too sweeping. The following actual, though not very considerable, privileges are enjoyed by registered unions: (1) Summary proceedings for the recovery of moneys withheld or misappropriated by officers and members;[25] (2) Avoidance of expense in the transfer of the union's property on a change of trustees, and in the appointment of trustees;[26] (3) Exemption of provident funds from income tax.[27]

The legislature possibly thought that in providing for the vesting of the property of registered unions in trustees it conferred a special power of holding property on registered unions which unregistered unions would not enjoy. But as a matter of fact, as soon as the illegality attaching to trade unions on the ground of restraint of trade was removed by the earlier section which applies to all trade

[23] *Id.*, § 6.

[24] Mackendrick *v.* Nat. Union of Dock Labourers, 48 Scot. L. R. 17 (1910).

[25] Act of 1871, § 12.

[26] Act of 1871, § 8; Act of 1876 (39 & 40 Vict. c. 22), § 4.

[27] Trade Union Provident Funds Act, 1893 (56 Vict. c. 2).

unions, the capacity to hold property through the medium of trustees followed as a matter of course, under the general law of trusts.

A question has, however, been raised with regard to the holding of land. The Act [28] expressly provides that a registered union may purchase or take on lease in the names of the trustees any land not exceeding one acre, and it is thought by some that outside this power no trade union can hold or acquire land.[29] Thus an unregistered union cannot hold land at all, a registered union cannot hold land exceeding one acre, nor acquire land otherwise than by purchase or lease. I would submit that this view is incorrect. There is nothing to prevent land as well as other property being held by trustees for any lawful voluntary society so long as the rule against perpetuities is not infringed; *i. e.*, property must not be held, whether under the terms of the conveyance, or bequest, or under the rules of the society as a permanent endowment of which the capital cannot be expended. Subject to this rule no special power of holding land is needed. Further, a trade union is not a charity, and therefore the provisions of the statutes relating to charitable uses which formerly made void gifts of land by will for charitable purposes, and which still impose formalities on dispositions *inter vivos* for such purposes, and in most cases require land given by will for charitable purposes to be sold within one year from the death, have no application. Land is commonly held by trustees for the benefit and the purposes of a golf club or cricket club, without any incorporation or any special privilege, and there seems to be no reason for putting trade unions in a different position from other lawful voluntary societies. The decision in *In re* Amos, Carrier *v.* Price, [30] in which it was decided that a gift of land by will was void as not falling within the Act of 1871 (which only refers to a *purchase* or *lease*) may be a correct decision on one of the grounds given for it by the Judge, namely, that the bequest upon the proper construction of the will involved a perpetuity, *i. e.*, a permanent capital endowment; but it is submitted that it is not a sound authority for the view that it is impossible for an unregistered union to hold land, or for a registered union to ac-

[28] Act of 1871, § 7.

[29] Schloesser and Smith Clark, The Legal Position of Trade Unions, 50 (1911). *Cf.* Greenwood, The Law Relating to Trade Unions, 167 (1911).

[30] [1891] 3 Ch. 159.

quire land otherwise than in accordance with section 7 of the Act of 1871.

Three questions relating to the position of trade unions which have been the subject of numerous and important decisions, and in one case have led to a remarkable piece of legislation, deserve special treatment.

1. The limitations imposed by section 4 of the Act of 1871 on the enforcement of trade-union contracts. This is a question which has arisen mainly in connection with claims by members to benefits.

The section does not make unenforceable any contract which would have been enforceable at common law. It merely prevents direct enforceability from following from the legalization of contracts which would otherwise have been unlawful as being in restraint of trade. It is therefore necessary in the first instance to inquire in each case whether there is anything in the rules of the union which would have been unlawful on this ground at common law. On this question the courts have to some extent fluctuated, and it is impossible to lay down a perfectly clear test as to what is and what is not an illegal rule in restraint of trade. But in substance it seems that the following distinction is sound: When members of a union are required under penalties to abstain from entering into employment on specified conditions, *e. g.*, taking piece work or taking work under conditions which the trade-union rules declare to be unfair; or to cease work whenever called upon to do so by a committee, such a rule is at common law illegal.[31] On the other hand, a rule merely providing that men going on strike for specified reasons, or after receiving the approval of a committee shall be entitled to strike pay, is not. Strikes are not illegal, nor is it illegal to provide for the maintenance of men on strike.[32]

Even if it is ascertained that some of the rules of the society are illegal at common law, it does not follow that other rules, which are not in themselves open to the objection of illegality, are unenforceable. The question is whether the legal and the illegal rules are so connected as to be inseparable. Whether they are separable or not is a question to be determined in each case. In general one

[31] Russell *v.* Amalgamated Society of Carpenters, [1910] 1 K. B. 506.

[32] Swaine *v.* Wilson, 24 Q. B. D. 252 (1889); Gozney *v.* Bristol Trade and Provident Society, [1909] 1 K. B. 901.

may say that where the strike funds and the benefit funds are not kept separate, where the main object of the society is a restraint of trade, and where the rules provide for a forfeiture of benefits in the event of a member refusing to comply with illegal trade rules, the rules relating to benefits cannot be separated, and all are equally unenforceable.[33]

The Act only prohibits the *direct* enforcement of contracts. It thus prohibits, where it applies, any claim for payment of benefits. But since the contracts contained in the rules, and the trusts upon which property is held for the purposes of the society, are made lawful and valid by the Act, there is no objection to any proceedings which will indirectly have the effect of tending to the observance of the rules and the application of the property for the purposes of the rules. In Wolfe *v.* Matthews,[34] members of an unregistered society sought an injunction to restrain other members from applying part of the funds in carrying out an amalgamation with another society. It was objected that the action was barred by section 4 of the Act. In overruling the objection Fry, J., said:

"It is plain that this is not an action to recover damages for breach of an agreement, neither is it, in my judgment an action directly to enforce an agreement, which proceedings are alone mentioned in the fourth section. An order that the defendants should pay money to the plaintiffs would be a direct enforcement of an agreement for the application of the funds, but all that is sought here is to prevent the payment of the moneys to somebody else. Either that is no enforcement of an agreement at all, or it is an indirect enforcement."

Similarly, in Yorkshire Miners' Association *v.* Howden[35] the House of Lords held that a member of a trade union was entitled to restrain the union from applying funds in giving strike pay contrary to the rules of the association.[36] Further, the Court of Appeal has recently held, in Osborne *v.* Amalgamated Society of Railway Servants

[33] Contrast Russell *v.* Amalgamated Society of Carpenters, *supra*, and Mudd *v.* General Union of Carpenters, 26 T. L. R. 518 (1910), with the cases cited in the last note and with Osborne *v.* Amalgamated Society of Railway Servants (No. 2), [1911] 1 Ch. 540. Some of the *dicta* seem to go so far as to make all the rules unenforceable in the case of any union of which the main object involves an illegal restraint of trade, even though individual rules taken by themselves may be unobjectionable.

[34] 21 Ch. D. 194 (1882).

[35] [1905] A. C. 256.

[36] *Cf.* Cope *v.* Crossingham, [1909] 2 Ch. 159.

(No. 2),[37] that even if the objects of a union are illegal at common law a member who has been unjustly expelled contrary to the rules is entitled to be reinstated. The contract of membership is not one of those which the Act declares to be unenforceable, and since membership does not entitle a member to enforce the contract to pay benefits to him, it follows that to declare him a member is not an enforcement of the contract for benefits.

It is a serious question whether any useful purpose is served by maintaining the unenforceability of the contracts for benefits. In practice the only cases where that section has been held applicable have been cases where a member claimed benefits which the union refused to pay, and we have had the curious spectacle of a trade union relying upon its own illegality at common law as a means of evading its obligations to its members. The section has in effect made the union as against its members a judge without appeal in its own cause, and has thus strengthened the control which the executive has over the members. Nor is it really in the interests of trade unionism that a man should feel that in joining a union he puts himself at the mercy of the possible tyranny or bad faith of those who are at the head of the organization.

The contracts, other than those to provide benefits, enumerated in section 4 of the Act appear not to have formed the subject of litigation. But it is well worth considering whether at any rate agreements between one trade union and another ought not to be made enforceable. Recent events have made it plain that one great obstacle in the settlement of trade disputes is the difficulty of obtaining the complete observance on one side or the other of the terms agreed upon. The observance rests only on the good faith of the parties, and a union has not the overpowering motive of liability for non-observance to induce it to do all in its power to secure the compliance of all its branches and members with what has been agreed upon. The only penalty for failure to observe the compact is a renewal of the dispute by a fresh strike or lockout. I believe that the principle of collective bargaining would be strengthened if agreements between unions of masters and men were backed by legal sanction.

Contracts for furnishing contributions to employers or workmen not members of the union in consideration of compliance with rules

[37] [1911] 1 Ch. 540.

or resolutions of the union are also declared unenforceable. Contracts of this kind appear not to be common, and no practical question arises with regard to them, but there seems to be no objection in principle to rendering them enforceable. The only case in which it seems right to maintain the rule of unenforceability is that of contracts for the discharge of fines imposed by a court of justice.

2. The liability of trade unions for wrongful acts committed on their behalf.

The liability of unions and their funds (apart from recent legislation) follows from the general principles of agency applied to voluntary societies, and independently of any special status conferred on registered unions is enforceable by means of a representative action. The existence and extent of the agency is, of course, a matter of fact, so long, at any rate, as the acts done are within the purposes for which the union legally exists. Two points as to the extent of this liability may be noted. First, it has been settled by the House of Lords that the branches of a union and the branch officers are not necessarily agents of the union, and that the rules of a union may well be such as to secure the union from liability for their wrongful acts.[38] This decision goes a long way to prevent an unfair or oppressive application of the rule of the principal's liability for the acts of his agent. Secondly, the application to trade unions of the doctrine of *ultra vires* in the Osborne case suggests a doubt whether acts done in pursuance of purposes in fact authorized by the rules of the union, but not included in the purposes recognized in the Trade Union Acts, would subject the union to any liability. In Linaker *v.* Pilcher [39] it was held that the funds of a union were liable for a libel contained in a newspaper conducted on behalf of the union. The judge in that case took the view that the carrying on of a newspaper was within the powers of a trade union. In the Osborne case,[40] Farwell, L. J., denied the correctness of the decision, partly, it would seem, on the ground that the carrying on of a newspaper is not within the lawful powers of a trade union. It may, however, be doubted whether the doctrine of *ultra vires* has any application to tortious acts. Certainly in the case of a corporation

[38] Denaby and Cadeby Collieries *v.* Yorkshire Miners Association, [1906] A. C. 384.

[39] 84 L. T. 421, 70 L. J. K. B. 396, 17 T. L. R. 256 (1901).

[40] Osborne *v.* Amalgamated Society of Railway Servants (No. 1), [1909] 1 Ch. 163, 193.

it has recently been held that it is no defense to allege that the wrongful act was not within the lawful powers of the corporation.[41]

The decision in the Taff Vale case,[42] in which the funds of a union were held liable, and its officers restrained by injunction, in respect of acts done in pursuance of a trade dispute, for the first time applied a quasi-corporate liability to trade unions. This liability in truth followed from general principles applicable to all voluntary societies, but it was taken by trade unionists as a piece of judicial legislation overriding the decision of the legislature, which had refused to incorporate trade unions. Not only do I think the decision right in principle, but in the particular case it cannot be said to have involved any injustice to the union; for the acts complained of were largely acts of violence, which no system of law ought to allow to be committed with impunity. But, taken in conjunction with other decisions, such as that in Quinn *v.* Leathem,[43] it threatened to paralyse all trade-union action which could be said to fall under the heading of unlawful combination or interference with trade, even action of the most peaceable kind. The result was that two questions which ought to have been kept distinct were confused: First, what classes of conduct ought to be treated as wrongful in individuals or combinations? Secondly, ought trade unions as bodies to be exempt from liability for wrongful conduct? The Trade Disputes Act of 1906, not content with establishing, rightly in my opinion, that conduct in contemplation or furtherance of a trade dispute ought not, if otherwise lawful, to involve any liability merely because it consists of acts done in combination, or amounts to an interference with trade, went further, and by section 4 removed all quasi-corporate liability from trade unions for any tortious acts whatsoever, at any rate if done in contemplation or furtherance of a trade dispute.[44]

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[41] Campbell *v.* Mayor, etc., of Paddington, [1911] 1 K. B. 869.

[42] Taff Vale Ry. Co. *v.* Amalgamated Society of Railway Servants, [1901] A. C. 426. The liability established in this case, of a registered union to be sued in its registered name, is as pointed out by Lord Lindley (at p. 444) a matter of form and not of substance. It is difficult to understand why some of the judges (*e. g.* Farwell, J., in [1901] 1 K. B. 170) should speak of the union's capacity to own property and to act by agents as giving it some of the essential qualities of a corporation in any sense in which this is not equally true of every lawful voluntary society.

[43] [1901] A. C. 495.

[44] Trade Disputes Act, 1906 (6 Edw. 7, c. 47), § 4:

"(1) An action against a trade union whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other mem-

It follows that at the present day the funds of a union cannot be made liable even for acts of violence, or for such wrongs as libel and deceit committed on behalf of the union, provided that those acts are done in contemplation or furtherance of a trade dispute. Nor (it would seem) do negligent acts done under the like circumstances involve the union funds in liability.

The limits of this exemption from liability must, however, be noticed: First, It is clear that the liability of individuals is in no way affected. All that is prohibited is an action against the union as such, or against members of the union as representing the whole body of the union. An officer or member of the union who himself commits tortious acts, or authorizes their commission, is still personally liable.[45] Secondly, It is not clear how far the exemption extends to acts not done in contemplation or furtherance of a trade dispute. The first part of section 4 is perfectly general, and contains no words referring to trade disputes. But subsection (2) provides that nothing in the section shall affect the liability of the trustees of a trade union to be sued in the events provided for by the Trade Union Act of 1871, section 9, except in respect of any tortious act committed by or on behalf of the union in contemplation or in furtherance of a trade dispute.

Now section 9 of the Trade Union Act of 1871, which in terms refers only to the trustees of a registered union, provides that the trustees may sue and be sued in any action "touching or concerning" the property of the union. It may be thought that this only refers to proceedings directly relating to the property of the union, *e. g.*, proceedings for a nuisance caused by the union premises being employed to the annoyance of neighbors, or being allowed to fall into dangerous disrepair. As a matter of fact, both before and since the Act of 1906 actions have been allowed against the

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bers of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any court.

"(2) Nothing in this section shall affect the liability of the trustees of a trade union to be sued in the events provided for by the Trade-Union Act 1871 section nine, except in respect of any tortious act committed by or on behalf of the union in contemplation or furtherance of a trade dispute."

It has been suggested that this section would not prevent the bringing of an action for an injunction in respect of a tortious act alleged to be threatened, but not committed.

[45] Bussy *v.* Amalgamated Society of Railway Servants, 24 T. L. R. 437 (1908).

trustees of a union in order to make the union property liable for acts of a very different kind. In Linaker *v.* Pilcher [46] an action was successfully brought against the trustees of a union for a libel published in the Railway Review, a periodical owned and published by the society, and registered as a newspaper in the names of the trustees. The action was brought at a time when the Court of Appeal had decided in the Taff Vale case that a trade union as such could not be sued, and before that decision had been reversed by the House of Lords. The law was, therefore, in substance supposed to be such as it has since been made by the Trade Disputes Act of 1906.

In Rickards *v.* Bartram [47] (after the Act of 1906) it was again held that the union funds could be made liable for a libel published in a newspaper on behalf of the union, the registered proprietors, who were presumably the trustees of the union, being made defendants, and the libel not being published in furtherance or contemplation of a trade dispute.

It is true that in Bussy *v.* Amalgamated Society of Railway Servants [48] the union funds were held not liable, but here it does not appear that the union trustees were parties.

Upon the whole I think that subsection (2) does to a very considerable extent preserve the liability of trade-union funds for wrongful acts committed on behalf of the union and unconnected with trade disputes. But the law must be considered as doubtful and unsatisfactory, until we have decisions of a higher court on several questions:

(*a*) Were Linaker *v.* Pilcher and Rickards *v.* Bartram right in deciding that trade-union funds could be made liable by means of an action against the trustees for a wrong connected with the property of the union only in so far as it consisted of a libel published in a newspaper registered in the names of the trustees?

(*b*) Can the principle be extended so as to cover cases where there is not even so much connection between the wrong and the union property, *e. g.*, for malicious prosecution undertaken on behalf of the union?

(*c*) Are any similar proceedings possible, in spite of the Trade

[46] 84 L. T. 421, 70 L. J. K. B. 396, 17 T. L. R. 256 (1901).
[47] 25 T. L. R. 181 (1908).
[48] 24 T. L. R. 437 (1908).

Disputes Act of 1906, against the trustees of an unregistered union?[49]

3. The Osborne decision[50] and the doctrine of *ultra vires*.

We here enter upon an aspect of trade-union law, which, unlike the topics hitherto discussed, is not explicable solely by reference to the principles of contract, agency, and trust which go to make up the structure of voluntary societies. So far as the principle of *ultra vires* is applicable to trade unions their status is not merely that of voluntary societies, but a status governed by the specific provisions of the Trade Union Acts. To a voluntary society that principle has, properly speaking, no application. In the case of a voluntary society it is no doubt true that acts done by the society or its officers and applications of the funds of the society, which are not in accordance with its rules, are not binding upon the members, and may be restrained by injunction at the suit of complaining members; but in such cases we have merely to deal with breaches of contract or of trust. There is no incapacity on the part of the society or of its members as a body to pursue certain activities, provided the rules as originally framed or as subsequently duly altered authorize such activities. Nor is there anything to prevent such rules from authorizing at the same time the most diverse activities, provided such activities are in themselves lawful; *e. g.*, to combine the promotion of political objects with social intercourse and amusement or the pursuit of profit. But the decision in the Osborne case is clear, that the pursuit of political objects in combination with the ordinary trade-union purposes is, at least, in the case of a registered trade union, *ultra vires*, and that the rules of such a trade union cannot be framed so as lawfully to confer the power to pursue such purposes. As Lord Macnaghten says,

"A rule which purports to confer such a power as that now in question on any Trade Union registered under the Act of 1871, whether it

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[49] In Vacher and Sons Ltd. *v.* London Society of Compositors, The Times, March 26, 1912, it was argued in the Court of Appeal that subsection 4 (2) enables an action for tort (not committed in contemplation or furtherance of a trade dispute) to be maintained against a trade union, even without making the trustees parties. The court reserved judgment.

[50] Amalgamated Society of Railway Servants *v.* Osborne (No. 1), [1909] 1 Ch. 163, [1910] A. C. 87.

be an original rule of the Union or a rule subsequently introduced by amendment, must be *ultra vires* and illegal."

So far as the decision in the Osborne case is based on the doctrine of *ultra vires*, and it is this doctrine which formed the basis of the *ratio decidendi* in which all the members of the Court of Appeal and the majority of the House of Lords concurred, it has nothing to do with any doctrine of public policy under which the particular application of funds to the support of "pledge-bound" members of Parliament might be considered objectionable, or with the principle asserted by Farwell, L. J., that the requirement of contributions for such purposes was an interference with the political liberty of the members. On the one hand, either of the latter grounds of objection, if correct, would apply equally to any other society, and even to transactions between persons not related to each other as members of a society. On the other hand, the rule that a trade union as such cannot apply its funds or require contributions for political purposes is based solely on the limitation of purposes imposed by the Acts of 1871 and 1876, which, by the defining section, as construed by the courts, confine the objects of a trade union to the two objects of trade regulation and the provision of benefits for members. The rule thus equally prohibits trade unions from applying their funds to any other purposes whatsoever, however non-political or otherwise unobjectionable; *e. g.*, contributions for the furtherance of education among the working classes. A Scotch court has, as a logical consequence of the Osborne decision, even restrained a trade union from paying the expenses of a delegate to the Trade Union Congress.

Does the principle of *ultra vires* as laid down in the Osborne decision apply to all trade unions or only to registered unions? The defendants in the Osborne case are a registered union, and the case cannot be taken as a decision with regard to unregistered unions. Among the judgments given, those of Cozens-Hardy, M. R., Farwell, L. J., Lord Macnaghten, and Lord Atkinson clearly go upon the footing that a registered union by accepting registration has acquired a peculiar status which subjects it to the rule of *ultra vires*. On the other hand, the judgment of Lord Halsbury seems to be based on a view that the mere legalization of trade unions by the Act of 1871 was a privilege which carries with it a restriction of the purposes which may lawfully be pursued. As regards later cases Lord Sker-

rington in the Court of Session [51] expressed a perfectly clear view that the Osborne decision has no application to unregistered unions.

"It is apparent that the ground of judgment that the purposes of a society are matters outside the purview of the Trade Union Acts, and therefore *ultra vires* can have no application to a society, which has no statutory constitution, and which is merely a voluntary association, such as an unregistered Trade Union."

In the circumstances of the particular case he held that the application of the trade-union funds for political purposes was a breach of contract. On the other hand, Leigh Clare, V. C.,[52] has taken the opposite view, that unregistered unions are as much within the Osborne case as registered ones.

I submit that on principle Lord Skerrington's view is the right one and that the Osborne decision has no application to unregistered unions. The principle on which the doctrine of *ultra vires* becomes applicable to corporate or unincorporated bodies is well stated in Lord Macnaghten's judgment, as follows:

"It is a broad and general principle that companies incorporated by statute, for special purposes, and societies, whether incorporated or not, which owe their constitution and status to an Act of Parliament, having their objects and powers defined thereby, cannot apply their funds to any purpose foreign to the purposes for which they were established, or embark on any undertaking in which they were not intended by Parliament to be concerned. . . . This principle is not confined to corporations created by Special Acts of Parliament. It applies, I think, with equal force in every case where a society or association formed for purposes recognised and defined by an Act of Parliament places itself under the Act, and by so doing obtains some statutory immunity or privilege." [53]

Now a union which applies for and obtains registration does exactly what Lord Macnaghten says. It voluntarily places itself under the Act, and by so doing obtains the privileges, not very extensive, it is true, but still actual privileges, conferred by registration. It does something analogous to what is done by a body of persons who apply for and obtain a grant of incorporation, and thereby subject themselves to a restriction to the purposes for which

[51] Wilson *v.* Scottish Typographical Association, [1911] 1 Scot. L. T. 253.

[52] Chancery Court of Lancaster, Manchester, July 8, 1910.

[53] [1910] A. C. at p. 94.

such incorporation is given. On the other hand, it is difficult to say that a trade union by merely coming into existence does anything analogous to placing itself under the Act. It no doubt gets the advantage — if its objects are in restraint of trade — that its contracts and trusts are not illegal, and are within limits enforceable. But this is something very different from the voluntary assumption of a status with counterbalancing disabilities, for it may well be that a society might prefer to retain its liberty of determining what purposes it would pursue even at the cost of remaining subject to the taint of common-law illegality. Further, there are, and apparently always have been, a considerable number of trade unions of which the purposes never were illegal at common law. Such unions, unless they applied for registration, never derived any benefit from the Trade Union Acts at all. If the opinion of the Court of Appeal in Osborne *v.* Amalgamated Society of Railway Servants (No. 2) is right, the defendant society in that case is an example of such a union.[54] Such a union, it is clear, might, apart from the Trade Union Acts, not only have lawfully pursued its trade purposes, but might have combined with them any political and other lawful purposes. It would certainly be a strange conclusion if the Trade Union Acts should be held to have taken away a liberty which such a society previously possessed.

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[54] It may be noted that this society, if its purposes were not illegal at common law, was not at the time of its formation in 1872 a trade union at all within the meaning of the Act of 1871, and was therefore at that time incapable of registration.